TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 335

UNITED STATES OF AMERICA, WHICH SUES FOR THE USE AND BENEFIT OF CHARLES P. WILHELM, TRUSTEE, ETC., ET AL., PETITIONERS,

vs.

NELLIE FLYNN CHAIN, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES W. FLYNN, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 2, 1936.

CERTIORARI GRANTED OCTOBER 19, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 335

UNITED STATES OF AMERICA, WHICH SUES FOR THE USE AND BENEFIT OF CHARLES P. WILHELM, TRUSTEE, ETC., ET AL., PETITIONERS,

vs.

NELLIE FLYNN CHAIN, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES W. FLYNN, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX.

	Original	Print
Record from D. C. U. S., Northern West Virginia	1	1
Caption (omitted in printing)	1	
Declaration	1	1
Demurrer	7	7
Supplemental demurrer	9	8
Order filing demurrer and supplemental demurrer	10	9
Judgment	10	9
Bill of exceptions	11	10
Caption	11	10
Stipulation as to facts	11	10
Order settling bill of exceptions	14	13
Assignment of error	15	14
Notice of appeal	16	15
Refusal of other defendants to join in appeal	16	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 22, 1936.

—8424-C

	Original	Print
Record from D. C. U. S., Northern Virginia—Continued.		
Memorandum under Sec. 7, Rule 14, C. C. A.	16	15
Stipulation under Rule 23, C. C. A.	17	16
Præcipe for record	17	16
Supplemental præcipe for record	18	17
Clerk's certificate (omitted in printing)	19	
Proceedings in U. S. C. C. A., Fourth Circuit	21	18
Docket entries	21	18
Opinion, Soper, J.	23	19
Dissenting opinion, Parker, J.	31	26
Judgment	35	29
Recital as to issuance of mandate	36	29
Recital as to appeal papers	36	29
Clerk's certificate	37	30
Order allowing certiorari	38	30

[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF WEST VIRGINIA

In Debt. At Law. No. 580. Elkins

THE UNITED STATES OF AMERICA, Which Sues for the Use and Benefit of Charles P. Wilhelm, Trustee of the Estate of W. H. Pentony, Bankrupt, Plaintiff,

vs.

THE KINGWOOD NATIONAL BANK, GEORGE A. HERRING and Nellie Flynn Chain, Executrix of the Estate of James W. Flynn, Deceased, Defendants

Note by District Clerk:

DECLARATION—Filed July 30, 1932

The United States of America, to the use of Charles P. Wilhelm, trustee of the estate of W. H. Pentony, bankrupt, a citizen and resident of the State of West Virginia, by F. E. Parrack, its attorney, sues The Kingwood National [fol. 2] Bank, a corporation under the laws of the United States of America, Geo. A. Herring and Nellie Flynn Chain, Executrix of the last will and testament of James W. Flynn, deceased, the latter two of whom are citizens of the State of West Virginia; and the said plaintiff says that Charles P. Wilhelm, trustee of the estate of W. H. Pentony, bankrupt, was duly appointed by this Court as such trustee on the 24th day of July, 1930, and which appointment was duly confirmed, and he has acted as, and is now acting as, such trustee, under proper bond and qualification, as aforesaid, and the said W. H. Pentony was duly adjudicated a bankrupt by this Court on the 9th day of July 1930; and that the said plaintiff sues the said defendants for that, and complains of them of a plea of debt, that they render unto it, for the use of the said Charles P. Wilhelm, trustee, as aforesaid, the sum of $5,000.00, lawful money of the United States, which they owe to and from it unjustly detain, and which the said Executrix unjustly detains from it, and the defendants The Kingwood National Bank, a corporation and Geo. A. Herring, owe to and from it unjustly detain;

And the said plaintiff says that the said James W. Flynn, departed this life on the day of March, 1926, and that the said Nellie Flynn Chain, Executrix as aforesaid, and defendant herein, qualified as executrix of his last will and testament on the 8th day of May, 1926, in the County Court of Preston County, West Virginia, having been duly appointed as such by the said Court on said date, and has ever since acted as, and is now acting as, such Executrix, under the will of the said James W. Flynn, deceased, which was duly probated in such County Court according to law, on the 8th day of April, 1926.

And that the said plaintiff sues the said defendants for that the said The Kingwood National Bank, a corporation, by its president and officer James W. Flynn, duly qualified so to act, and the said Geo. A. Herring and the said James W. Flynn, in the lifetime of the latter, did, on the 26th day of July, 1924, in Preston County, West Virginia, by their writing obligatory, sealed with their seals, and now unto the Court here shown, and which writing obligatory is substantially as follows:

[fol. 3] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Bond of the Kingwood National Bank as Depository for Moneys of Bankrupt Estates

In the U. S. District Court, Northern District of West Va. Filed Jul. 30, 1934 *19*— At Elkins, West Va. I. Wade Coffman, Clerk.

Know All Men by These Presents: That We, The Kingwood National Bank, of Kingwood, W. Va., a banking corporation created and existing under and by virtue of the laws of the United States as Principal, and Geo. A. Herring and James W. Flynn both of Kingwood, Preston County, West Virginia, as Sureities, are held and firmly bound to the United States of America in the sum of Five Thousand Dollars lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assignees, jointly and severally, firmly by these presents.

In Witness Whereof, *the* The Kingwood National Bank has hereunto caused its name to be signed by its President

and its Corporate Seal to be affixed as and for its act and deed; and the said Geo. A. Herring and James W. Flynn, have hereunto signed their names and affixed their seals this 26th day of July, 1924.

The Condition of This Obligation is Such that whereas the said The Kingwood National Bank was on the 22nd day of July, 1924, designated by the Honorable W. E. Baker, Judge of the District Court of the United States for the Northern District of West Virginia, as depository for the funds arising in the matter of the estates of bankrupts, under the acts of Congress relating to Bankruptcy.

Now, Therefore, if the said The Kingwood National Bank shall well and faithfully discharge and perform all the duties pertaining to its as depository of the funds, arising in the estates of bankrupts, then this obligation [fol. 4] shall be void, otherwise to remain in full force and virtue.

The Kingwood National Bank, by James W. Flynn, President. (Seal.) Geo. A. Herring, (Seal.) James W. Flynn. (Seal.)

STATE OF WEST VIRGINIA,
County of Preston, to-wit:

On this 26th day of July, 1924, the above named James W. Flynn personally appeared before me and upon his oath says that he is the President of the above named bank, and that he signed the foregoing bond for and on behalf of the said Banking Corporation, and at the same time the above named Geo. A. Herring and James W. Flynn, appeared before me and severally acknowledged the execution of the foregoing bond.

Chas. H. Manown, Notary Public. My Commission expires on the 22nd day of April, 1929. (Seal.)

STATE OF WEST VIRGINIA,
County of Preston, to-wit:

Geo. A. Herring and James W. Flynn, the sureties on the foregoing bond, being duly sworn, deposes and says that he is a resident and a freeholder within Preston County and said District and is worth in property at its actual value $32,500.00 over all debts and liabilities which he owes

or has incurred and exclusive of property exempt by law from sale under execution.

Geo. A. Herring. James W. Flynn.

Subscribed and sworn to by and before me this 26th day of July, 1924. Chas H. Manown, Notary Public. My Commission expires on the 22nd day of April, 1929. (Seal.)

Approved July 30, 1924. W. E. Baker, U. S. District Judge.

[fol. 5] And which written obligatory is signed by the defendants, the said Kingwood National Bank, a corporation by its President, as aforesaid, and by Geo. A. Herring, and by James W. Flynn in the latter's lifetime, and whose Executix, as aforesaid, is sued herein, and the date whereof is the same day and year last aforesaid, and in which writing obligatory the defendants the Kingwood National Bank, a corporation, by its president as aforesaid, and the said Geo. A. Herring, and the said James W. Flynn, in the latter's lifetime, and whose exec*tu*rix is sued thereon herein as aforesaid, acknowledged themselves to be held and firmly bound unto the said United States of America, in the just and full sum of $5,000.00, which said sum is above demanded, to be paid to it, the United States of America, for the use of the said Charles P. Wilhelm, trustee of the estate of W. H. Pentony, bankrupt, as aforesaid. Yet the said Kingwood National Bank, a corporation, and the said Geo. A. Herring, and the said Nellie Flynn Chain, Executrix of the last will and testament of James W. Flynn, deceased, have not, nor has either of them as yet paid the said sum of $5,000.00, or any part thereof, to the said United States of America, though often requested so to do, but they have, and each of them has, hitherto wholly refused and neglected, and they do, and each of them still does, so neglect and refuse to pay the same to the said United States of America; nor did the said James W. Flynn pay the same in his lifetime, and his executrix still detains the said sum from the said United States of America, although requested to pay over the same and to not longer detain it from this plaintiff.

The said bond as shown above, was duly filed in this Court according to law, with the Clerk thereof, July 30th,

1924, and was duly approved by the Honorable W. E. Baker, Judge of the United States District Court for the Northern District of West Virginia, according to law, on the 30th day of July, 1924; and the said The Kingwood National Bank, a corporation, was thereupon duly approved, according to the statute law of the United States of America as a depository for the moneys belonging to the estates of bankrupts, by the said Court.

The said bond, as shown above, binds the heirs, executors, administrators, successors and assignees, jointly [fol. 6] and severally, of its several signers, as shown above, and the said James W. Flynn, in his lifetime, signed and sealed the same, on the date as shown, and this action is against his Executrix, Nellie Flynn Chain, as aforesaid, as well as the defendants The Kingwood National Bank, a corporation, and Geo. A. Herring.

The said trustee in bankruptcy, Charles P. Wilhelm, as trustee for the estate of W. H. Pentony, bankrupt, deposited in the said The Kingwood National Bank, a corporation, sums of money belonging to the said estate, as the same were received by him, starting such deposits on the 12 day of August, 1930, and all of which deposits were approved by this Court, by its Referee in bankruptcy before whom said bankruptcy matter of W. H. Pentony, bankrupt, is now pending; and under the order of this Court, by its Referee as aforesaid, withdrawals were made from said trustee account in said Kingwood National Bank from time to time; and new deposits were put in said account and approved as aforesaid by this Court, and said deposits and withdrawals were so made from said date of August 12th, 1930, in said account, in said bank, until the 22nd day of June, 1931.

On the 22nd day of June, 1931, the said The Kingwood National Bank, a banking association under the laws of the United States of America, closed its doors and ceased to do business any longer as a banking institution, and became insolvent; and refused to pay its depositors, and refused to pay the said trustee the balance which he had to his account on said date as such trustee of such bankrupt's estate in the said Bank, although often requested by said trustee so to do. The trustee had as his balance in said trustee's account in said Bank, on the said 22nd day of June, 1931, the sum of $3,190.72, which the said defend-

ants The Kingwood National Bank, a corporation, and the said Geo. A. Herring, owe to this plaintiff and unjustly retain from it, and which sum the said Nellie Flynn Chain, Executrix as aforesaid of the last will and testament of the said James W. Flynn, deceased, unjustly detains from this plaintiff; and on which sum the said plaintiff claims interest at six per cent per year from said 22nd day of June, 1931, until paid, and which interest also the said two first named defendants owe to this plaintiff and unjustly detained from it, and which the said defendant, Nellie Flynn [fol. 7] Chain, Executrix as aforesaid, unjustly detains from this plaintiff.

And the plaintiff further says that the said The Kingwood National Bank did not well and faithfully discharge and perform all the duties pertaining to it as depository of the funds, arising in the estates of bankrupts; but, on the contrary, did cease and close as a banking business on the 22nd day of June, 1931, as aforesaid, owing to the said plaintiff, for the use of the said trustee of the estate of W. H. Pentony, bankrupt, the sum of $3,190.72, with interest from said 22nd day of June, 1931, until paid, and still so owes the same, and refuses to pay same when demanded; wherefore, the plaintiff shows that the defendant herein, to-wit, The Kingwood National Bank, a corporation, and the sureties on said bond, Geo. A. Herring and James W. Flynn, the latter by his Executrix, as aforesaid, did not fulfill the condition of said depository bond, and, therefore are liable to the plaintiff herein for and on account of the same; and the conditions of which depository bond are shown above in this declaration, into which it is substantially copied.

And this plaintiff brings this action in this Court by reason of the statute laws of the United States for America which authorize the said The United States of America, when a plaintiff in an action at law, to maintain said action in this Court.

Yet the defendants, although often requested, have not, nor has either of them, paid to the plaintiff or to the said Charles P. Wilhelm, trustee of the estate of W. H. Pentony, bankrupt, the sum of money above demanded, or any part thereof, but so to do have hitherto wholly refused and still do refuse, to the damage of the plaintiff $5,000.00 and therefore this suit is brought.

F. E. Parrack, Attorney for the Plaintiff.

In United States District Court

Demurrer of Nellie Flynn Chain, Executrix—Filed August 3, 1932

Demurrer of the defendant, Nellie Flynn Chain, executrix, to the plaintiff's declaration.

This defendant Nellie Flynn Chain, executrix, demurs to the plaintiff's declaration and says that the same is not [fol. 8] sufficient in law to show any liability on estate of the surety James W. Flynn, nor on his executrix, heirs or devisees.

And for grounds of demurrer this demurrant assigns the following reasons:

The declaration sets forth and avers that the bond sued on with James W. Flynn, surety, was executed July 26, 1924, and was approved by the District Court of the United States for the Northern District of West Virginia, on the 30th day of July, 1924.

That said surety departed this life in the month of March, 1926, and that this defendant, Nellie Flynn Chain, was appointed and qualified as executrix of the last will and testament of said James W. Flynn in the month of May, 1926.

That the first deposit made by the plaintiff, Charles P. Wilhelm, as trustee of the estate of W. H. Pentony, bankrupt, in the Kingwood National Bank, principal on the bond, was made August 12, 1930, about four years and five months after the death of the surety James W. Flynn.

That certain other deposits and withdrawals of said bankrupt's estates funds were made between August 12, 1930, and June 21, 1931, when a balance of the said last mentioned date in the sum of $3,190.72 remained in said bank as funds belonging to the estate of the said bankrupt.

That on said date, June 21, 1931, the said bank closed its doors becoming and was insolvent, which said date, June 21, 1931, was about five years and three months after the death of the surety, James W. Flynn.

That the averments in said declaration show there were no funds of the estate of said bankrupt or of any other bankrupt on deposit in the defendant bank at the time of the death of said surety, James W. Flynn, and had been no such deposits for more than four years after the death of said surety.

That it is not averred in said declaration that this defendant as executrix had any knowledge nor was she notified that such funds were being or would be deposited in said bank after the death of said surety.

That the said declaration does not aver that this defendant had any knowledge or information that said funds were [fol. 9] so on deposit before the said bank closed its doors as aforesaid.

That it is not averred in said declaration that either before or after the death of said surety, James W. Flynn, his said executrix knew that he was surety on said bond or that such bond existed.

For the foregoing reasons and grounds and for other reasons and grounds appearing upon the face of said declaration this demurrant prays that her demurrer be sustained and that this action be dismissed as to her as to the estate of the said James W. Flynn.

Nellie Flynn Chain, Executrix, Defendant, by her Attorney P. J. Crogan.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL DEMURRER TO PLAINTIFF'S DECLARATION—Filed March 13, 1933.

The defendant, Nellie Flynn Chain, Executrix of the estate of James W. Flynn, deceased, now here adds this supplemental demurrer to the plaintiff's declaration in addition to the demurrer heretofore filed and says, that said declaration is not sufficient in law to show any liability on the estate of the surety, James W. Flynn, or his executrix, heirs or devisees.

And now, for further and additional ground of demurrer assigns the following reason:

Because the declaration does not allege that the trustee did not know the surety, James W. Flynn, was dead before the said deposits were made by said trustee in the defendant bank.

For the foregoing reason and ground and as well for the reasons and grounds heretofore filed in a former demurrer to the declaration this demurrer prays that her demurrer

be sustained and that this action be dismissed as to her and as to the estate of the said James W. Flynn.

Nellie Flynn Chain, Executrix, Defendant, by P. J. Crogan, Her Attorney.

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER FILING DEMURRER AND SUPPLEMENTAL DEMURRER—Filed March 13, 1933

This Thirteenth day of March, 1933, came the parties hereto by their counsel, and the defendant Nellie Flynn Chain, executrix, tendered and by leave of the Court filed her supplemental demurrer to the plaintiff's declaration herein.

Thereupon the demurrer (heretofore filed) and the said supplemental demurrer of said Nellie Flynn Chain, executrix, were argued by counsel and the said demurrer and supplemental demurrer submitted to the Court for its decision thereon.

By leave of the Court, counsel for said Nellie Flynn Chain and for said plaintiff filed their respective briefs upon the said demurrer and supplemental demurrer.

Enter.

W. E. Baker, Judge.

IN UNITED STATES DISTRICT COURT

JUDGMENT ORDER—Entered September 21, 1935

This 21st day of September, 1935, came again the parties by their attorneys, and said parties having heretofore waived trial by jury and submitted this case to the Court in lieu of a jury and having by leave of the Court filed an agreed statement of facts entitled "Stipulation by Parties", dated the 24th day of July, 1933, and neither party desiring to introduce any further evidence, now, upon presentation thereof, the Court is of opinion to and doth find for the plaintiff against the defendants and each of them, in the sum of Three Thousand Six Hundred and Eighty Dollars and Twenty-five Cents ($3,680.25).

It is therefore considered by the Court that the plaintiff Charles P. Wilhelm, Trustee of the estate of W. H. Pentony, do recover of and from the defendants The Kingwood National Bank, a corporation, George A. Herring, and Nellie Flynn Chain, Executrix of the will of James W. Flynn, [fol. 11] deceased, the sum of Three Thousand Six Hundred and Eighty Dollars and Twenty-five Cents ($3,680.25), with interest thereon from this date until paid, such recovery as to Nellie Flynn Chain, Executrix, to be from funds and property in her hands as such Executrix and not from her individual property; and that said plaintiff do also recover of and from said defendants his costs about the prosecution of his action in this case as allowed by statute, and all proper taxable costs herein; and to the judgment of the Court herein the defendants by their attorneys object and except.

Enter.

W. E. Baker, Judge.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions by Executrix—Filed October 24, 1935

Be it remembered that on the 24th day of July, 1933, at the hearing and trial of this case, counsel for the plaintiff and for the defendant having notice hereof and being present at said hearing, the said parties waived trial by jury and submitted the case to the court in lieu of a jury, and by leave of the court filed an agreed statement of facts entitled "Stipulation by Parties", dated the 24th day of July, 1933, which stipulation is in the words and figures following:

STIPULATION AS TO FACTS

"The parties to the above styled cause, United States of America and Charles P. Wilhelm, Trustee, by their attorney, F. E. Parrack; The Kingwood National Bank and George A. Herring by their attorney, James T. Dailey; and Nellie Flynn Chain, Executrix of the will of James W. Flynn, deceased, by P. J. Crogan, her attorney, hereby stipulate, with regard to the facts in said case, subject to the following conditions, viz:

The said United States of America and Charles P. Wilhelm, Trustee, by their attorney, and the Kingwood National Bank and George A. Herring by their attorney, believe that the facts stipulated, and each of them, are immaterial, and would not be by a Court permitted to be introduced in evidence over objection if the case were tried [fol. 12] by a jury; and said parties, not waiving, but insisting upon the immateriality of said facts, and that the Court should hold them to be immaterial, except as to the execution and approval of said bond as herein alleged, and not consider them in determining this controversy, admit and stipulate that if said facts, or any of them, are material, the following facts actually exist:

(a) That the bond in question was executed by the parties thereto, as alleged in the declaration in this case, and was in words, figures and characters as set forth in said declaration, and was executed and filed for the purpose of making said The Kingwood National Bank a depository for funds of bankrupt estates, and having said bank legally designated as such depositary, and that said bond was approved by this Court, and recorded in its records in all respect as in said declaration alleged; and that at the time said bond was executed by James W. Flynn, he and the defendant George A. Herring, were each directors of said Bank.

(b) That said Flynn and Herring each resided in the Town of Kingwood, Flynn so residing up to the time of his death, and Herring continuously so residing up to the present time.

(c) That upon the death of said Flynn, said Herring became the president of said Bank, and also remained a director thereof until the closing of the said bank in 1931.

(d) That the trustee, Charles P. Wilhelm, resided in the Town of Kingwood before and at the time of the death of said James W. Flynn, but was not personally acquainted with said Flynn, and had no knowledge of the death of said Flynn at the date of said death but had such knowledge about June, 1931, but was at that time attending a law school outside of Kingwood, and never had the death of said Flynn officially as trustee called to his attention in any way until the latter part of the year 1931. That had said Trustee been called upon to make investigation in re-

gard to the bond given by said The Kingwood National Bank, for the purpose of being made a depository for funds of bankrupt estates, said Trustee would have learned of the [fol. 13] death of said James W. Flynn. But at the time he deposited the funds now in question in said bank, said Charles P. Wilhelm, Trustee, was informed by the Referee in Bankruptcy to whom said cause was referred that the Kingwood National Bank was a duly qualified depositary for funds of bankrupt estates, and approved the deposit of said money in said bank by said Trustee; and at the time said deposit was made said Trustee had no knowledge of who signed the bond.

(e) That the defendant, Nellie Flynn Chain, executrix, had no knowledge of the existence of said bond until after said bank closed, when she was notified of its existence by the Receiver of said bank.

That Nellie Flynn Chain, the defendant, was employed as one of the book-keepers in said bank for a period of about three weeks in the year 1925, and likewise was employed for a week or ten days in May or June, 1926, after her father's death; that she never knew said Bank was a depositary for funds of bankrupt's estates.

That she never knew that her father, James W. Flynn, was an obligor of the bond in question, and never knew that there was such a bond until after the bank closed when she was notified by the Receiver of said Bank.

That she never was cashier or assistant cashier of said Bank, nor required to perform any of the duties of said offices.

That she also was employed in said Bank as bookkeeper during parts of the years 1918 and 1919.

(f) The parties hereby agree that this case be submitted to the Court, to be heard and determined by the court in lieu of a jury, the parties expressly hereby waiving a trial by jury, and agreeing that the case be so heard and determined by the Court upon the declaration, demurrer thereto, arguments or counsel, and upon this stipulation as to the facts, so far as the Court may hold said facts to be material.

(g) It being agreed that in passing upon said case the Court shall accept as true the allegations of said declara-

tion showing the fact that after the death of said James [fol. 14] W. Flynn said, The Kingwood National Bank, continued to act as a depositary for funds of bankrupt estates without giving any further or other bond than that relied upon in the declaration in this case, and that said Charles P. Wilhelm, Trustee, deposited as such Trustee the amount of money set forth in said declaration in said The Kingwood National Bank, on account of the bankrupt estate of W. H. Pentony, Bankrupt, and that there remained in said Bank to the credit of said Trustee, on account of said deposit, at the time said bank was placed in the hands of a Receiver, the amount of money shown by the declaration in this case; and that since this suit was instituted there has been paid to the said Trustee a dividend of (10%), amounting to $319.07, on the sixth day of January, 1933, and that no further or other sums have been paid to said Trustee by any one upon the amount claimed in said declaration".

And upon presentation of the case on said stipulation the Court on the 21st day of September, 1935, found for the plaintiff against the defendants, and each of them, in the sum of $3,680.25, and with interest from said 21st day of September, 1935, and the cost of this proceeding, to which action of the Court and order the defendant Nellie Flynn Chain, Executrix of the estate of James W. Flynn, deceased, excepted and tendered this her bill of exceptions, and asked that the same be granted and allowed, settled and signed.

P. J. Crogan, Counsel for the defendant Nellie Flynn Chain, Executrix.

ORDER SETTLING BILL OF EXCEPTIONS

Settled and allowed this 24th day of October, 1935.

W. E. Baker, Judge.

The undersigned attorneys of record in the above case hereby agree to the foregoing form of bill of exceptions.

F. E. Parrack, Counsel for C. P. Wilhelm, Trustee and The Kingwood National Bank. J. T. Dailey, Counsel for George A. Herring.

[fol. 15] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERROR—Filed November 27, 1935

Now comes Nellie Flynn Chain, Executrix of the last will and testament of James W. Flynn, deceased, in the above numbered and entitled case, and in connection with her petition for an appeal in this cause assigns the following error, which plaintiff avers occurred on the trial and hearing thereof, and upon which she relies to reverse the judgment entered herein, as appears of record.

This case having been tried by the court, a jury being waived by the parties, and heard by the court on written stipulations of fact made a part of the record, and the court erred in entering judgment against the defendant Nellie Flynn Chain, Executrix of the last will and testament of James W. Flynn, deceased, for the amount of said judgment, the action being upon a bond executed by the Kingwood National Bank with the said George A. Herring and James W. Flynn, since deceased, as sureties, the said bank being made a depositary for funds of bankrupt estates, and the plaintiff Charles P. Wilhelm, Trustee, made a deposit in said bank of the funds of the bankrupt estate, such deposit being made over four and one-half years after the death of said James W. Flynn, and without the knowledge of his personal representative, and unknown to her, until after the said bank became insolvent and was closed in 1931.

The judgment complained of being entered as aforesaid on the 21st day of September, 1935, and found for the plaintiff against the defendants, including this petitioner, in the sum of $3,680.25.

Wherefore plaintiff prays that the judgment of said court be reversed.

Nellie Flynn Chain, Executrix, by P. J. Crogan, Her Attorney.

[fol. 16] IN UNITED STATES DISTRICT COURT

APPELLANT'S NOTICE TO OTHER DEFENDANTS OF INTENTION TO APPEAL—Filed December 28, 1935

To the Kingwood National Bank, a corporation and George A. Herring, defendants in the above styled case:

You are hereby notified that it is the intention of this defendant, Nellie Flynn Chain, Executrix of the estate of James W. Flynn, deceased, to ask for an appeal in this case, and you are requested to join in said petition. Otherwise, if you refuse this defendant will ask for an appeal alone by filing a motion in court stating the facts and asking for the issuing of the writ in her behalf.

Nellie Flynn Chain, Executrix of the last will of James W. Flynn, Deceased, by P. J. Crogan, Her Attorney.

The Kingwood National Bank and George A. Herring refuse to join in said appeal.

J. H. Bane, Receiver for Kingwood National Bank.
George A. Herring, by J. T. Dailey, His Attorney.

IN UNITED STATES DISTRICT COURT

MEMORANDUM UNDER SECTION 7, RULE 14, C. C. A.

(1) Petition for appeal. Filed: November 27, 1935.
(2) Order allowing appeal. Entered and filed: November 27, 1935.
(3) Order extending time for citation. Entered and filed: January 6, 1936.
(4) Citation: Dated January 7, 1936.
Acceptance of service dated January 9, 1936.
Filed: January 11, 1936.
[fol. 17] (5) Bond: Dated November 21, 1935.
Approved January 4, 1936.
Penalty $500.00.
Obligors: Nellie Flynn Chain, Executrix, Felix Elliott.
Conditioned for damages and costs.

IN UNITED STATES DISTRICT COURT

STIPULATION TO PREPARE TRANSCRIPT OF RECORD AND PRINT SAME UNDER RULE 23 OF UNITED STATES CIRCUIT COURT OF APPEALS—Filed December 5, 1935

It is hereby stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above styled cause, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va.; and that it be printed under the supervision of the Clerk of that Court in accordance with Rule 23.

F. E. Parrack, Counsel for Charles P. Wilhelm, Trustee. P. J. Crogan, Counsel for Nellie Flynn Chain, Executrix.

November 30, 1935.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD—Filed December 5, 1935

The Clerk of said Court will please make up a transcript of this case and include in the same:

Declaration of Plaintiff.
Demurrer of Nellie Flynn Chain, Executrix.
Order of the Court on demurrer and joinder.
Order of the Court overruling demurrer and
Judgment on overruling the demurrer.
[fol. 18] Bill of exceptions by Executrix.
Petition for appeal by same.
Assignment of error by same.
Refusal of defendant Bank and Herring to join in petition.
Allowance of appeal.
Citation.
Bond.

Respectfully, P. J. Crogan, Counsel for Executrix.

The undersigned counsel for the plaintiff, Charles P. Wilhelm, Trustee, hereby agrees that the præcipe for the record asking for a transcript is satisfactory to said plain-

tiff, and counsel for plaintiff is willing that the matters set forth in said præcipe be included in the record and no additional papers need be included.

F. E. Parrack, Counsel for Charles P. Wilhelm, Trustee.

In United States District Court

Supplemental Præcipe for Record—Filed January 16, 1936

The clerk of said Court will please include in the transcript of the record of this case the supplemental demurrer of the defendant, the same being inadvertently omitted from the original præcipe.

Respectfully submitted, P. J. Crogan, Counsel for Executrix.

Agree to. F. E. Parrack, Counsel for Plaintiff.

[fols. 19 & 20] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 21] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4007

NELLIE FLYNN CHAIN, Executrix of the Last Will and Testament of James W. Flynn, Deceased, Appellant,

versus

CHARLES P. WILHELM, Trustee of the Estate of W. H. Pentony, Bankrupt, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Elkins

January 18, 1936, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, order extending time for issuance of citation, citation, and appeal bond are certified up under section 7 of Rule 14.

Same day, the appearance of P. J. Crogan is entered for the appellant.

February 4, 1936, twenty-five copies of the printed record are filed.

[fol. 22] February 11, 1936, the appearance of F. E. Parrack is entered for the appellee.

ARGUMENT OF CAUSE

April 6, 1936, (April term, 1936) cause came on to be heard before Parker, Northcott and Soper, Circuit Judges, and is taken on the brief on behalf of the appellant and argued by counsel on behalf of the appellee, and submitted.

[fol. 23] OPINION—Filed June 8, 1936

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

At Law. No. 4007

NELLIE FLYNN CHAIN, Executrix of the Last Will and Testament of James W. Flynn, Deceased, Appellant,

versus

CHARLES P. WILHELM, Trustee of the Estate of W. H. Pentony, Bankrupt, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Elkins

(Argued April 6, 1936. Decided June 8, 1936.)

Before Parker, Northcott and Soper, Circuit Judges

P. J. Crogan for Appellant, and F. E. Parrack for Appellee.

SOPER, Circuit Judge:

The crucial question to be determined in this case is whether the obligation of an individual surety upon a de-[fol. 24] pository bond given by a bank to secure the repayment of funds deposited by trustees in bankruptcy expires with the death of the surety. On July 30, 1924, the Kingwood National Bank of Kingwood, West Virginia, as principal, and George A. Herring and James W. Flynn, both of the same place, as sureties, executed a bond under seal in the sum of $5000. to the United States, for the payment of which they bound themselves, their heirs, executors, successors and assignees, jointly and severally. It was recited that the bank on July 22, 1924, had been designated as a depository of funds of estates in bankruptcy by the District Judge of the District Court of the United States for the Northern District of West Virginia; and the condition of the obligation was that if the bank should faithfully discharge and perform all the duties pertaining to it as such depository, then the obligation should be void; otherwise of full force and effect. The bond was approved by the District Judge and deposited with the clerk of the court.

Thereup n, under the provisions of the National Bankruptcy Act, 11 U. S. C. A. Ch. 101, 78 (h) the bank became an authorized depository of bankruptcy funds and the bond became subject to suit in the name of the United States for the use of any person injured by breach of its condition.

Flynn, the surety, whose liability under the bond is the subject of this discussion, was president of the bank. In March, 1926 he died, and thereupon Nelly Flynn Chain was appointed executrix of his estate. Herring, the other surety, was vice-president of the bank, and upon Flynn's death became the president. On August 12, 1930, more than four years after the death of Flynn, the trustee of the bankrupt estate of W. H. Pentony opened an account with the bank and made deposits therein until June 22, 1931, when the bank having become insolvent closed its doors. The trustee then had a balance to his credit of $3190.72, and to recover this sum with interest the present suit was [fol. 25] brought against the bank, Herring, the co-surety, and the executrix of the deceased surety. There is no evidence that any other bankruptcy funds were deposited in the bank either before or after the death of the surety.

The executrix raised the point in the District Court that Flynn's estate had no liability on the bond because he had died before the bankruptcy funds were deposited. The case was submitted to the court on an agreed statement of facts which, in addition to the facts already set out, showed that the executrix did not know of the existence of the bond until after the bank had closed; that the trustee before making the deposit was informed by the referee in bankruptcy that the bank was a duly qualified depository; that the trustee had no knowledge of the death of Flynn when he made the deposits, but would have learned of the death of Flynn if he had made any investigation in regard to the depository bond given by the bank; and that only 10 per cent of the funds deposited by the trustee had been repaid by the receiver of the insolvent institution. Upon these facts, the court found for the trustee in bankruptcy in the sum of $3680.25 with interest, and judgment for this amount was entered against the surety's estate; and the executrix, having excepted to the ruling of the court, entered this appeal.

The liability of the estate of the surety for a breach of the condition of the bond occurring after his death depends in the first place upon whether the bond was in itself a

binding contract from the date of execution or merely an offer which did not ripen into a contract until deposits were made; and then, if it is found that the bond was a complete contract in itself, it must also be determined whether it terminated or lapsed as to the deceased surety before the deposits were made. It has been suggested that there was no binding contract prior to death because the bond was merely an offer to insure the return to the depositors of funds deposited in the bank, and that until somebody accepted the offer by making a deposit, no binding contract [fol. 26] was formed; and since no deposits were made during the life of the surety, the contract as to him never went into effect. The situation is likened to a continuing guaranty of a series of performances in which the guarantor, without present consideration, guarantees a series of future sales or credits, such as a guarantee of the payment of the purchase price of goods to be sold, or the repayment of money to be loaned, from time to time, in the future. It has been generaly held that such a promise is in effect a series of continuing offers which do not ripen into contracts until each credit in the series is extended; that "the consideration is fragmentary, supplied from time to time and therefore divisible"; In re Crace, (1902) 1 Ch. 733, quoting Lloyd's vs. Harper, (1880) 16 Ch. D. 290; and while neither revocation nor death will affect the guarantor's liability for transactions previously entered into, either revocation or death will prevent further liability from accruing. Williston on Contracts, Sections 58, 1253.

On the other hand, when the consideration for the promise is indivisible and entire, and is given all at once at the outset, as in the case of the official bond of a guardian or administrator, clerk of court or county treasurer, the surety cannot revoke it, nor will his death relieve his estate from liability for subsequent defaults although the acts guaranteed may cover a long or indefinite period of time. Hecht vs. Weaver, 34 F. 111; Pond vs. United States, 111 F. 989; McClaskey vs. Barr, 79 F. 408; Fewlass vs. Keeshan, 88 F. 573; United States vs. Keiver, 56 F. 422; Williston on Contracts, Section 1253 and cases cited in Note 81.

In our opinion, the depository bond in the pending case is more nearly analogous to a guarantee of a series of sales or credits than to an official bond. It is true that upon the approval and filing of a depository bond in bankruptcy, the

bank acquires the status of an authorized depository, but until deposits are made, it is not an actual depository and [fol. 27] no liability for the repayment of funds can arise. Moreover, the period of responsibility is not only long continued, as sometimes is the case of an official bond, but conceivably it is without end and it is not reasonable to conclude that the surety enters into such a contract with the intention that he and his estate shall be forever bound as to future deposits without the possibility of revocation or withdrawal.

The effect of death upon a revocable offer is thus stated in the Restatement of Contracts, Section 48:

"A revocable offer is terminated by the offeror's death or such insanity as deprives him of legal capacity to enter into the proposed contract."

(See also Section 35). This rule has been criticized on the ground that under the modern view of the formation of contracts, it is not the actual meeting of the minds of the contracting parties that is the determining factor, but rather the apparent state of mind of the parties embodied in an expression of mutual consent; so that the acceptance by an offeree of an offer, which is apparently still open, should result in an enforceable contract notwithstanding the prior death of the offeror unknown to the offeree. On the other hand, it has been forcibly suggested that ordinarily the condition is implied in *on* offer that the offeror will survive to supervise the performance if his offer is accepted, and therefore an acceptance after death is ineffective even though the acceptor be ignorant of the offeror's death. See the discussion by Herman Oliphant in 18 Mich. Law Review, 201; James Lewis Parks, 19 id. 152, 23 id. 475, 29 Univ. of Mo. Bulletin (Law Series 40) 5; Merton L. Ferson in 10 Minn. Law Review, 373; Selected Readings on the Law of Contracts, pages 251, 260, 266, 275; Williston on Contracts, Revised Edition, Section 62. These conflicting views, however, were given consideration in the preparation of the Restatement, and the rule announced was adopted as representing the weight of authority and pro- [fol. 28] fessional opinion. See Proceedings of the American Law Institute, Vol. 3, Section 35, pages 196 to 202.

The same rule has been announced with reference to a revocable offer contemplating a series of contracts, such

as a continuing guaranty, if no seal is attached to the writing. Restatement, Section 44. In the cases in which the subject has been considered little or no account has been taken of the effect of a seal. In the greater number of the American cases, death alone has been held sufficient to terminate the offer, notice of death not being requisite. See United States vs. Robson, 9 Fed. Supp. 446; Jordan vs. Dobbins, 122 Mass. 168; Hyland vs. Habich, 150 Mass. 112; Aitken vs. Lang's Adm., 106 Ky. 652; In re Kelley, 173 Mich. 492; Michigan State vs. Leavenworth's Estate, 28 Vt. 209; L. Terpitz Thrown Silk Co. vs. Rich, 179 A. 305; American Chain Co. vs. Arrow Grip Mfg. Co., 235 N. Y. S. 228; Klatte vs. Franklin State Bank, 211 Wis. 613; see also Valentine vs. Donohoe, 133 Cal. 191; In re Lorch, 284 Pa. 500. In the following cases, notice of death has been stated to be necessary, although in some of them it was not necessary to decide the point; Gay vs. Ward, 67 Conn. 147; Natl. Eagle Banks vs. Hunt, 16 R. I. 148; Buckeye Cotton Oil vs. Amhrein, 168 La. 139; Exchange Bank vs. Hunt, 75 Wash. 513; Bradbury vs. Morgan (1862) 8 Jur. N. S. 918; In re Silvester, (1895) 1 Ch. 573; Coulthart vs. Clementson, (1879) L. R. 5 Q. B. D. 42; Harriss vs. Fawcett (1873) L. R. 8 Ch. 866; Dodd vs. Whelan (1897) 1 I. R. 575, (Ireland).

The depository bond in the pending case was under seal and although the effect of the seal was not discussed at the bar, we shall assume, as was concluded in a study of the legal status of the private seal in West Virginia in 40 W. Va. Quarterly, 330, that in regard to such an instrument, local legislaton has not altered the general rule of the common law that an offer under seal is a completed contract in itself irrespective of consideration. The rule as to the term- [fol. 29] ination of such a contract by revocation or death is not so broad or inflexible as that set out in Sections 35 and 48 of the Restatement with reference to revocable offers generally. Section 46 of the Restatement is as follows:

"Sec. 46. Offers Which are Themselves Contracts.—An offer for which such consideration has been given or received as is necessary to make a promise binding, or which is in such form as to make a promise in the offer binding irrespective of consideration, cannot be terminated during the time fixed in the offer itself or, if no time is fixed, within

a reasonable time, either by revocation or by the offeror's death or insanity."

And Section 40 of the Restatement with respect to what lapse of time terminates an offer, provides:

"(1) The power to create a contract by acceptance of an offer terminates at the time specified in the offer, or if no time is specified, at the end of a reasonable time.

(2) What is a reasonable time is a question of fact, depending on the nature of the contract proposed, the usages of business and other circumstances of the case which the offeree at the time of his acceptance either knows or has reason to know."

In harmony with this statement of the law, it has been held that a statutory bond under seal, unlimited as to time, to secure the transmission to foreign countries of monies paid to steamship agents, is revocable upon reasonable notice to the official with whom the bond was required to be filed. Vidi vs. United Surety Co., 140 N. Y. S. 612; and the liability of sureties on a sealed instrument, unlimited as to time, to secure the payment for goods sold and delivered or the faithful performance of duty by an insurance agent or collector, may be terminated by notice reasonable in point of time under all the circumstances. Jeudevine vs. [fol. 30] Rose, 36 Mich. 54; Emery vs. Baltz, 94 N. Y. 408; Ricketson vs. Lizotte, 90 Vt. 386; Bremer vs. Rufener, 186 Wis. 195.

The depository bond in the present case was unlimited as to time. In our opinion the question, whether it was still effective and binding upon the estate of the deceased surety in 1930 when the first deposit was made, depends upon whether more than a reasonable time had elapsed since the execution of the contract; and in determining what was a reasonable time, we must consider all the circumstances of the case, including all those which the depositor knew or had reason to know when the deposit was made. When this is done, we are compelled to conclude that more than a reasonable time had passed in view of the circumstances surrounding the giving of the bond, the making of the first deposit, and the intervening death of the surety. When he died, the bond had been in existence for two years, and so far as we know, no trustee in bankruptcy

had ever made a deposit in the bank under the protection of the surety's promise. Indeed, not until four years after the surety's death did the trustee of the Petony Estate make a deposit and attempt to bring himself within the terms of the bond. At that time, as required by 11 U. S. C. A. 78 (f), the bond was on file in the office of the clerk of the court, and the trustee was charged with notice of its contents and was not relieved therefrom by the informal statement of the referee that the bank was an authorized depository of bankruptcy funds. The agreed statement shows that if at the time of the deposit the trustee had made an investigation in regard to the bond, he would have learned the true situation, and he would not have been able reasonably to conclude that the bond was still in effect. Such, we think, would necessarily have been the normal reaction of any reasonable man; and so it is clear that the bond had already terminated when the first deposit was made, and there was no factual basis for the verdict of the trial court.

It was said in Continental Casualty Co. vs. United States, [fol. 31] 68 F. (2d) 577, 580, with regard to a bond to secure deposits of bankruptcy funds, that there is no serious dispute of the right of a surety to terminate its suretyship where the term of the obligation is unlimited and the thing secured to be done is the compliance with specified contractual undertakings of the principal; but that to effect such a termination, proper proceedings should be taken. In our view, a surety on a depository bond in bankruptcy who desires to be relieved of the obligation under the bond, should give notice of withdrawal by petition to the court, and should secure an order of court revoking its appointment. It does not follow, however, that the liability of an individual surety upon such a bond must continue after his death until such a petition has been filed and order of court has been obtained. It is the duty of courts of bankruptcy under 11 U. S. C. A. 101, not only to designate bankruptcy institutions as depositories and to require depository bonds, but from time to time, as occasion may require, to increase the amount of any bond or change the depositories. Hence it is incumbent upon the court to keep itself informed as to the condition of such bonds and the responsibility of the sureties thereon, and it is not too much to expect the court to ascertain whether individual sureties are

living or dead, and to cancel the bond of a deceased surety within a reasonable time after his death.

The judgment of the District Court is Reversed.

PARKER, Circuit Judge, Dissenting:

In my view of this case, the bond sued on is in no sense a mere offer, revocable by the death of the offeror. It is a solemn contract, which was entered into pursuant to law in order that a bank might be designated by order of court as official depository of bankruptcy funds. 11 U. S. C. A. [fol. 32] 101. As a result of the giving of the bond, the bank was created an official depository and was eligible to receive deposits of bankruptcy funds as such. I cannot conceive that liability under the bond terminated, while this official status of the bank continued, merely because of the death of the bondsman. The bond is but a promise under seal and upon a sufficient consideration to pay to the United States the amount therein stipulated. It is well settled that a promise to pay money survives the death of the promisor; and I know of no principle upon which the promisor may be absolved merely because the promise is upon a condition and the breach of the condition occurs after his death. Death terminates the power of a deceased to act and revokes any authority or license he may have given; but his estate is liable upon a binding contract existing at the time of hs death, even though the liability may depend upon future contingencies.

I can see no difference in principle between such a case and that presented by any other bond required for the creation of an official status such as that of collector, guardian, administrator, sheriff or clerk of the court. In the case of such bonds, the rule is perfectly well settled that the estate of a deceased surety is liable for breaches and defalcations occurring after his death. 21 R. C. L. 982; 24 C. J. 290. Thus, such liability has been enforced upon the bond of a Collector of Internal Revenue: Pond v. U. S. (C. C. A. 9th) 111 Fed. 989, 997; upon the bond of an administrator: Hecht v. Skaggs, 53 Ark. 291, 22 Am. St. Rep. 192; upon the bond of a deputy sheriff: Green v. Young, 8 Greenleaf 14, 22 Am. Dec. 218; upon the bond of a clerk of the court: Snyder v. State, 5 Wyo. 318, 63 Am. St. Rep. 60; upon the bond of a guardian: Moore v. Wallis, 18 Ala. 458; upon the bond of a cashier of a bank: Shackamaxon Bank

v. Yard, 150 Pa. St. 351, 30 Am. St. Rep. 807, 810; and upon the bond of an agent for an insurance company: Royal Ins. Co. v. Davis, 40 Ia. 469, 20 Am. Rep. 581. The reason for [fol. 33] the rule was well stated more than a hundred years ago by Judge Weston, speaking for the Supreme Judicial Court of Massachusetts, in Green v. Young, supra, where the deputy sheriff's bond, like the bond before us, did not run for a fixed period. Said he:

"The intestate undertook that the principal in the bond should discharge the duties of the office to which he was appointed. For what period? So long as he continued in office under that appointment. The breach found, then, is within the very letter of the condition. The counsel for the defendant sets up, as a limitation of the liability of the intestate, that it is confined to breaches accruing in his life-time. This limitation is not to be found in the instrument; and if it is sustained, it must arise by construction of law from the nature of the undertaking. We have examined with care the cases cited for the defendant, but can find nothing to justify the limitation for which he contends. The plaintiff had a right to repose upon the solvency and sufficiency of the surety. If his security in regard to future breaches ceases upon the death of the surety, he might suffer, however vigilant. He might incur severe responsibilities, arising from subsequent breaches, before he could be advised of the death of the surety. If the defendant, representing the intestate, is not liable in this case, the death of a surety upon a sheriff's bond, and upon the bonds of the treasurer of the state, of a county, or town, of cashiers of banks, and of many other officers who are required to give bonds, would exonerate his estate from subsequent breaches, and throw the whole responsibility upon surviving sureties."

It is suggested that the bond here is distinguishable from official bonds because it does not run for a fixed period. Neither, for that matter, did the bonds in a number of the cases cited; but I think that this is a distinction without a difference. The condition of the bond is that the bank shall well and faithfully discharge and perform all duties pertaining to it as depository of funds. For what period? So long as the bank shall continue as a depository or until [fol. 34] liability shall be terminated upon substitution of

another bond under order of court. Id certum est quod certum reddi potest. The idea that, because the period of liability is not limited in the bond, the bondsman may terminate liability at any time he sees fit, does not appeal to me as sound. He has made it possible for the bank to be appointed a depository by going on its bond. An order of court has solemnly approved the bond and designated the bank as depository. And I do not think that he can be relieved of the obligation thus solemnly assumed, except by an act of court of equal solemnity, i. e. by an order terminating the status of the bank or approving another bond. As said by the Circuit Court of Appeals of the Seventh Circuit in Continental Casualty Co. v. U. S. 68 Fed. (2d) 577, 582, "Such suretyship is not to be lightly entered into, and when undertaken is not to be lightly terminated." In that case it was held that the surety could not terminate his liability under the bond merely by giving notice to the judge and to the bank.

But whatever be the right of the bondsmen to terminate liability by notice, which would lead to the requirement of another bond if the official status of the bank is to be continued, I do not see how such liability may be terminated merely by death without notice, which permits the continuance of the official status that the bond was given to safeguard. The liability under the bond was assumed that the official status of the bank might be created; and it seems unreasonable to me to give a construction to the bond which makes it possible for the liability thereunder to be terminated, without action by the court, while the official status of the bank, which was dependent upon that liability, is continued.

[fol. 35] JUDGMENT—Filed and Entered June 9, 1936

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4007

NELLIE FLYNN CHAIN, Executrix of the Last Will and Testament of James W. Flynn, Deceased, Appellant,

vs.

CHARLES P. WILHELM, Trustee of the Estate of W. H. Pentony, Bankrupt, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of West Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Northern District of West Virginia, at Elkins, with [fol. 36] directions to set aside the verdict and grant a new trial in accordance with the opinion of the Court filed herein.

Morris A. Soper, U. S. Circuit Judge.

June 9, 1936.

On another day, to-wit, July 10, 1936, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States at Elkins, West Virginia, in due form.

Same day, the original petition for appeal, order allowing appeal, and bond are returned to the Clerk of the District Court of the United States at Elkins, West Virginia.

[fol. 37] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereunto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 17th day of August, A. D., 1936.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit, by R. M. F. Williams, Jr., Deputy Clerk. (Seal United States Circuit Court of Appeals, Fourth Circuit.)

[fol. 38] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter F. E. Parrack. File No. 40,875. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 335. United States of America, which sues for the use and benefit of Charles P. Wilhelm, Trustee etc., et al., petitioners, vs. Nellie Flynn Chain, Executrix of the last will and testament of James W. Flynn, deceased. Petition for writ of certiorari and exhibit thereto. Filed September 2, 1936. Term No. 335, O. T., 1936.